

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1394

To be argued by

JAMES J. HANRAHAN, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRIMINAL CASE NO. 77-1394

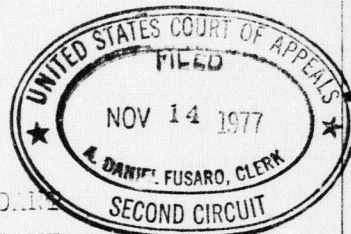
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P/S

UNITED STATES OF AMERICA

-against-

JOSEPH DOHNERT

DEFENDANT
APPELLANT



On appeal from the United States District
Court for the Southern District of
New York

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JAMES J. HANRAHAN, Esq.
Attorney for Defendant Appellant
202 East 110th Street
New York City

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRIMINAL CASE NO. 77 -1394

UNITED STATES OF AMERICA

VS.

JOSEPH DOHNERT

DEFENDANT
APPELLANT

APPELLANT'S BRIEF

STATEMENT

This is an appeal by the above named defendant from a Judgment of conviction by the Southern District of New York as of August 23rd, 1977 filed in the office of said clerk of the Court which said Judgment ordered the above named defendant to the custody of the United States Attorney General for confinement to a Federal Penitentiary for a period not to exceed two (2) years.



THE FACTS

That the defendant appellant Joseph Dohnert along with one Frank Chierco was charged by indictment 76 Cr 1098 filed on December 3rd, 1976 setting forth in the first count of said indictment that on October 5th, 1976 he did under said count of the indictment unlawfully, wilfully and knowingly and with intent to defraud did pass, utter, publish and attempt to pass, utter and publish certain falsely made, forged counterfeit and altered obligations and securities, to wit, \$2,000.00 in counterfeit \$100 Federal Reserve notes in violation of Title 18 United States Code Section 472 and 2 and in addition thereto Joseph Dohnert was charged with two other counts of possession of counterfeit bills, in like amounts in violation of 18 U.S.C. 472 and 473.

That the defendant did enter a guilty plea to the first count of the indictment on February 25, 1977 before Judge Kevin T. Duffy, although shaky at the time when asked how he felt and had been under psychiatric observation and hospitalization in the past and considered alcoholic according to his probation Department and report.(A-9).

That a study was recommended by his former attorney pursuant to Title 18 Section 4208(d) and the Court then remanded the defendant on April 14, 1977 for a psychiatric work-up.

New counsel on April 25, 1977 made a motion to vacate the sentence and to place the defendant on probation as he had no previous record except for drunken driving, was 44 years of age, and supported some eight (8) children and that the defendant could be treated at a local hospital with elevil and return to his work as a superintendent. (A 9)

The court denied the motion.

On June 23rd, 1977 after the defendant had entered his plea, some 3½ months later, a superseding indictment was filed which indictment included a conspiracy count in addition to the three (3) other counts of the first indictment.

In the meantime the defendant was sent for three(3) months to Springfield, Missouri for the study pursuant to Title 18 U.S.C. 4205 although he had been sentenced to 15 years (A 8) and after completion of the three month study period was sentenced on August 23rd, 1977(A-8A) to a period of not exceeding two years.

A motion to vacate the sentence was made and heard on September 14, 1977 questioning the legality of the sentence as the defendant could not be sentenced under the original indictment as a superseding indictment had replaced the original and the prosecution had interrupted the sentencing procedure. (A-21), and for various other reasons advanced.

This motion was denied and forms the basis for the appeal.

POINT ONE

NOT ONLY IS THE VALIDITY OF THE FIRST INDICTMENT QUESTIONABLE BUT THE FAILURE TO ARRAIGN UNDER THE SECOND OR SUPERSEDING INDICTMENT AND FURTHER WHETHER ONLY A TRANSCRIPT WAS READ TO THE 2ND GRAND JURY, A DIFFERENT GRAND JURY, AS TO THE LAST THREE COUNTS OF THE SECOND INDICTMENT RENDERS THE LATTER AS WELL QUESTIONABLE AS TO THE VALIDITY OF THE SECOND INDICTMENT: FURTHER THERE WAS AN INTERRUPTION OF THE SENTENCE UNDER THE FIRST INDICTMENT BY THE SUPERSEDING INDICTMENT

The original indictment and the superseding indictments were handed up by different Grand Juries.

The superseding indictment contained in the first count a general conspiracy accusing Joseph Dohnert of conspiring with one Frank Chierco to violate Section 473 of Title 18 United States Code to sell, exchange, transfer and deliver certain false, forged, counterfeit and altered obligations in the sum of \$4,000.00 and the commission of seven (7) overt acts in furtherance of said conspiracy (Title 18 U.S.C. 371).

Before a Grand Jury may return a second indictment it must physically rehear at least so much of the evidence as is necessary to cover each essential element of the crime. However presentation of a transcript of the Grand Jury proceedings under the 1st indictment to a 2nd Grand Jury, a different Grand Jury, amounts to hearsay evidence causing the superseding indictment to be defective as based on hearsay and

nullifying the entire proceedings. In successive or superseding indictments the situations arise where the prosecutor discovers the first indictment is not only legally insufficient or that the evidence does not correspond with the allegations of the first indictment. In such instances a plea of guilty would be a nullity as a defendant cannot plead guilty to a defective indictment.

Due Process attaches to every crucial stage of the criminal proceedings and Grand Juries and their proceedings are vital stages, crucial stages of the proceedings and in addition thereto legal instructions should be given to each and every count of the indictment as is outlined in the Penal Law of the State of New York 190.25(6) and the defendant a citizen of the State of New York is entitled to no less, whether it be a state or federal charge and in the latter such as zealously guarding of said rights must be afforded to the protection of each and every citizen as outlined in the Ninth amendment to the U.S. Constitution-the unenumerated rights of every citizen of the United States, and the 14th amendment of the U.S. Constitution with respect to due process. The defendant is entitled to criminal proceedings free from the corrosion of substantial legal errors.

The defendants were not arraigned on the superseding indictment, a critical stage in a criminal proceeding nor could they interpose any available defenses thereto.

RULE 10, FEDERAL RULES OF CRIMINAL PROCEDURE, PROVIDES:

ARRAIGNMENT: Arraignment shall be conducted in open Court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

" Arraignment and plea are a matter of substance and must be affirmatively shown by the record. Johnson Vs. U.S. 225 U.S. 405. In Hamilton Vs. Alabama 368 U.S. 53, 54 . . ."Under federal law an arraignment is a sine qua non to the trial itself-the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issues to be tried. Crain Vs. United States 162 U.S. 625, 644: Rules 10, 11 of the Federal Rules of Criminal Procedure.

The arraignment should have been held on the superseding indictment as the rule does not specifically exclude superseding indictments and the pleas under the original indictment if taken. Moreover, the fact that the defendant interposed a plea to the original indictment which may have been a nullity raises the issue of the prosecution going forward with the arraignment under the second or superseding indictment since they initiated the prosecution and have the burden of complying with Rule 10.

The defendant while undergoing a study was indicted under a superseding indictment causing in effect an interruption of his sentence for which he was not reponsible. This could have severed and prohibited his further incarceration but at least be sufficient added

for him to be arraigned.

In matter of Gault 387 U.S. 1

"Due Process of law is the primary indispensable foundation of individual freedom.

To by pass the arraignment under the second indictment, a matter of substance, is an erosion of due process, for every defendant is entitled to equal protection of our laws.

As was ably stated in Boyd Vs. United States 116 U.S. 616, 635.

"Those who frame our constitution and the Bill of rights were ever aware of subtle encroachments on individual liberty. They knew that illegitimate and unconstitutional parties get their first footing* by silent approaches and slight deviation."
(emphasis ours)

The due process clause requires that every man shall have the protection of his day in Court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily nor capriciously Hurtado Vs. California 110 U.S. 516, 535.

The due process clause guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so.

POINT TWO

THAT THE INHERENT POWER OF THE COURT OF APPEALS CAN BE INVOKED TO MODIFY ANY SENTENCE UNDER TITLE 18 Section 4205 (d) and place the defendant on probation.

CONCLUSION

That both indictments should be dismissed as violations of due process or in the alternative to place the defendant on probation.

RESPECTFULLY SUBMITTED
JAMES J. HANRAHAN

E-27-11 X

Search Warrant ☐ Issued ☐ Return	Summons ☐ Issued ☐ Served	Arrest Warrant Issued ☐ COMPLAINT	OFFENSE (In Complaint)	DATE 10-7-76	INITIAL NO. MDJ 08AB	MAGISTRATE INITIAL APPEARANCE DATE 10-7-76 PRELIMINARY EXAMINATION OR REMOVAL HEARING 10-27-76 ☐ WAIVED ☒ NOT WAIVED ☐ INTERVENING INDICTMENT	INITIAL NO. MDJ 08AB	OUTCOME ☐ DISMISSED ☐ HELD FOR OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR OR OTHER PROCEEDING IN DISTRICT BELOW
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COUNTERFEITING 18 USC-472

U.S. Attorney or Asst.

Henry H. Korn
791-1991

ATTORNEYS

James J. Hanrahan
James J. Hanrahan 202 E. 110th St. NYC

* Show last names and suffix number of other defendants on same indictment/information.

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCUSABLE DELAY
Chierco-02			
10-7-76		Complaint filed, deft. presented, Legal Aid assigned, deft. released ROR until 10-8-76 to sign bond.	
10-8-76		Deft. appeared to sign bond and deposit security of \$500. Address: 611 West 163rd St. Apt. 53, NYC.	
12-3-76		INDICTMENT FILED, 76CR 1098. Motley, J.	pc
12-9-76		Deft. (atty. John P. Curley present) pleads not guilty. Bail \$5,000 PRB secured by \$500 cash continued. Case assigned to Duffy, J. for all purposes. Motley, J.	
12-10-76		Filed financial affdvt.	
12-10-76		Filed appearance bond in amt. of \$5,000	
1-18-77		PRE-TRIAL CONFERENCE HELD & CONCLUDED. For trial 3-1-18-77 E-1 Feb. 18, 1977 at 10 a.m. DUFFY, J	
2-25-77		(Atty present) Deft Withdraws his previously entered plea of Not Guilty and now pleads GUILTY to Count 1 ONLY. Pre-Sentence report Ordered. Sentence adj. to 4-18-77. BAIL CONTINUED. DUFFY, J	A

CONTINUED ON PAGE 2.

Clerk of the Court

A-1

DUFFY, J.

Filed Judgment (Atty. John P. Curley Federal Defender Services, present) The defendant is committed for imprisonment on count 1 for the maximum period authorized by law, to wit: FIFTEEN (15) YEARS and for a study as described in Title 18, United States Code, Section 4205(d), the results of such study to be furnished this Court within three months, unless the Court grants further time not to exceed three months, whereupon the defendant shall be returned to this Court and the sentence of imprisonment herein imposed shall be subject to modification in accordance with Title 18, United States Code, Section 4205(c). DUFFY, J. Entered on: 4-18-77.

Issued commitment and copies.

- 77 Filed affdvt. & order to show cause with a stay for an order vacating and setting aside a sentence study pursuant to 18:4244 etc. Ret. 4-25-77....Duffy, J.
- 77 Filed notice of appearance by James J. Hanrahan 202 E. 110th St. NYC
- 77 Filed memo endorsed on order to show cause filed 4-22-77... Motion denied... See minutes of hearing of 4-25-77... Duffy, J. M/N....
- 77 Filed order to show cause for an order vacating and setting aside a sentence study pursuant to 18:4244... Ret. 5-2-77 Rm. 619 Duffy, J....
- 77 Filed Memo Endorsed on OSC filed 4-29-77..... The within motion is denied. See minutes of hearing of May 2, 1977. DUFFY, J m-n notified U.S. Atty.
- 3-77 Filed Deft's NOTICE OF APPEAL to USCA 2nd Circuit from from judgment filed on 4-14-77. copy mailed to: James J. Hanrahan, atty. for deft. 202 East 110th St. NYC and copy to U.S. Atty.

18-77 Filed transcript of record of proceedings, dated 4-25-77

-77 Filed transcript of record of proceedings dated: 2-25-77.

-77 Filed transcript of record of proceedings dated: 4-14-77.

DATE	RECEIPT NUMBER	CD NUMBER	DATE	RECEIPT NUMBER	CD NUMBER

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By *[Signature]*
Deputy Clerk

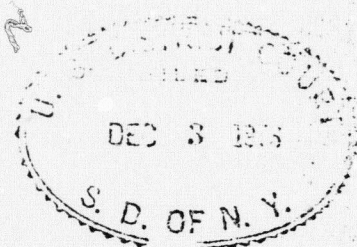
- v -

JOSEPH DOHNERT, a/k/a "Juan"
and FRANK CHIERCO,

Defendants.

:
:
:

76 Cr.



COUNT ONE

The Grand Jury charges:

On or about the 5th day of October, 1976, in the Southern District of New York, JOSEPH DOHNERT, a/k/a "Juan", the defendant, unlawfully, wilfully and knowingly, and with intent to defraud, did pass, utter and publish, and attempt to pass, utter and publish certain falsely made, forged, counterfeited and altered obligations and securities of the United States, to wit, \$2,000 in counterfeit \$100 Federal Reserve Notes.

(Title 18, United States Code, Sections 472 and 2.)

COUNT TWO

The Grand Jury further charges:

On or about the 5th day of October, 1976, in the Southern District of New York, JOSEPH DOHNERT, a/k/a "Juan", the defendant, unlawfully, wilfully and knowingly, did sell, exchange, transfer and deliver certain false, forged, counterfeited and altered obligations and securities of the United States, to wit, \$2,000 in counterfeit \$100 Federal Reserve Notes, with the intent that the same be passed, published and used as true and genuine.

(Title 18, United States Code, Sections 473 and 2.)

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The Grand Jury further charges:

On or about the 6th day of October, 1976, in the Southern District of New York, JOSEPH DONNERT, a/k/a "Joey", and FRANK CHIERCO, the defendants, unlawfully, wilfully and knowingly and with intent to defraud, did keep in possession and conceal certain falsely made, forged, counterfeited and altered obligations and securities of the United States, to wit, \$2,000 in counterfeit \$100 Federal Reserve Notes.

(Title 18, United States Code, Sections 472 and 2.)

Joseph Donnert
FOREMAN

Robert B. Fiske, Jr.
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA :

- v - :

INDICTMENT

JOSEPH DOHNERT a/k/a "Juan" :
and FRANK CHIERCO, :

S 77 Cr. 1090

Defendants. :

----- x
COUNT ONE

The Grand Jury charges:

1. From on or about the 5th day of October, 1976, up to and including the 6th day of October, 1976, in the Southern District of New York, JOSEPH DOHNERT a/k/a "Juan" and FRANK CHIERCO, the defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, to wit, to violate Section 473 of Title 18, United States Code.

2. It was part of said conspiracy that JOSEPH DOHNERT a/k/a "Juan" and FRANK CHIERCO, the defendants, unlawfully wilfully and knowingly, did sell, exchange, transfer and deliver certain false, forged, counterfeited and altered obligations and securities of the United States, to wit, \$4,000 in counterfeit \$100 Federal Reserve Notes, with the intent that the same be passed, published and used as true and genuine.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, JOSEPH DOHNERT a/k/a "Juan" and FRANK CHIERCO, the defendants, did commit the following overt acts, among others, in the Southern District of New York:

1. On or about October 5, 1976, JOSEPH DOHNERT a/k/a "Juan", the defendant, met with an agent of the United States Secret Service, who was acting in an undercover capacity in the vicinity of 163rd Street and Broadway, New York, N.Y., concerning the agent's purchase of counterfeit Federal Reserve Notes.

2. On or about October 5, 1976, JOSEPH DOHNERT a/k/a "Juan", the defendant and the undercover agent drove in the agent's car to the vicinity of 90th Street and Lexington Avenue, New York City.

3. On or about October 5, 1976, JOSEPH DOHNERT a/k/a "Juan" and FRANK CHIERCO, the defendants, met in the vicinity of 1349 Lexington Avenue, New York City.

4. On or about October 5, 1976, in the vicinity of 163rd Street and Broadway, New York City, JOSEPH DOHNERT a/k/a "Juan", the defendant, had a conversation with the undercover agent concerning the sale of \$2,000 in counterfeit \$100 Federal Reserve Notes and JOSEPH DOHNERT a/k/a "Juan" received from the agent five genuine \$100 Federal Reserve Notes.

5. On or about October 5, 1976, JOSEPH DOHNERT a/k/a "Juan" and FRANK CHIERCO, the defendants, met in the vicinity of 1349 Lexington Avenue in an automobile driven by JOSEPH DOHNERT a/k/a "Juan."

6. On or about October 5, 1976, JOSEPH DOHNERT a/k/a "Juan," the defendant, met with the undercover agent in the vicinity of 163rd Street and Broadway and JOSEPH DOHNERT a/k/a "Juan" gave the agent \$2,000 in counterfeit \$100 Federal Reserve Notes.

7. On or about October 6, 1976, JOSEPH DOHNERT a/k/a "Juan," the defendant, met with the same undercover agent in the vicinity of 163rd Street and Broadway, had a

conversation concerning the sale of \$2,000 in counterfeit \$100 Federal Reserve Notes and JOSEPH DOHNERT a/k/a "Juan" received from the agent five genuine \$100 Federal Reserve Notes.

3. On or about October 6, 1976, JOSEPH DOHNERT a/k/a "Juan" and FRANK CHIERCO, the defendants, met in the vicinity of 1349 Lexington Avenue in an automobile driven by JOSEPH DOHNERT a/k/a "Juan".

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about the 5th day of October, 1976, in the Southern District of New York, JOSEPH DOHNERT, a/k/a "Juan" the defendant, unlawfully, wilfully and knowingly, and with intent to defraud, did pass, utter and publish, and attempt to pass, utter and publish certain falsely made, forged, counterfeited and altered obligations and securities of the United States, to wit, \$2,000 in counterfeit \$100 Federal Reserve Notes.

(Title 18, United States Code, Sections 472 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 5th day of October, 1976, in the Southern District of New York, JOSEPH DOHNERT, a/k/a "Juan," the defendant, unlawfully, wilfully and knowingly, did sell, exchange, transfer and deliver certain false, forged, counterfeited and altered obligations and securities of the United States, to wit, \$2,000 in counterfeit \$100 Federal Reserve Notes, with the intent that the same be passed, published and used as true and genuine.

(Title 18, United States Code, Sections 473 and 2.)

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G-4

COUNT FOUR

The Grand Jury further charges:

On or about the 6th day of October, 1976, in the Southern District of New York, JOSEPH DOHNERT, a/k/a "Juan", and FRANK CHIERCO, the defendants, unlawfully, wilfully and knowingly and with intent to defraud, did keep in possession and conceal certain falsely made, forged, counterfeited and altered obligations and securities of the United States, to wit, \$2,000 in counterfeit \$100 Federal Reserve Notes.

(Title 18, United States Code, Sections 472 and 2.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

A-71

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
APRIL 11, 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to
have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

John P. Curley Federal Defender Services
(Name of counsel)

PLEA

☒ GUILTY, to ct. 1 only,
and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☐ GUILTY.

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly
and with intent to defraud, did pass, utter and publish, and attempt
to pass, utter and publish certain falsely made, forged, counterfeited
and altered obligations and securities of the U.S., to wit, \$2,000.00
in counterfeit \$100.00 Federal Reserve Notes.

(Title 18, United States Code, Sections 472 and 2.)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary
was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is
hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for ~~three months~~

SENTENCE
OR
PROBATION
ORDER

on count 1 for the ~~maximum~~ period authorized by law, to wit: FIFTEEN (15) YEARS
and for a study as described in Title 18, United States Code, Section 4205(d),
the results of such study, to be furnished this Court within three months, unless
the Court grants further time not to exceed three months, whereupon the
defendant shall be returned to this Court and the sentence of imprisonment
herein imposed shall be subject to modification in accordance with Title 18,
United States Code, Section 4205(c).

SPECIAL
CONDITIONS
OF
PROBATION

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the
reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at
any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke
probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

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APR 19 1977

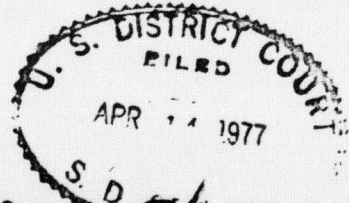
KEVIN THOMAS DUFFY

It is ordered that the Clerk deliver
a certified copy of this judgment
and commitment to the U.S. Mar-
shal or other qualified officer.

BY

☒ U.S. District Judge

☐ U.S. Magistrate



April 11, 1977

A-8

1 jprp

Dohnert

10

2 man's sentence?

3 MR. HANRAHAN: I am saying this is the back-
4 ground of the type of people that we have and who he was
5 associated with until he had his fall.

6 THE COURT: Anything else, Mr. Dohnert?

7 DEFENDANT DOHNERT: Well, all I can say, Judge,
8 like I said before, my kids, I got two little kids and
9 they are sick all the time and they have been crying and
10 crying, "When Poppy will come back home?"

11 Give me a chance, give me a break and I
12 appreciate it. I'm in church now and I'm becoming a priest
13 now. I am an historian now and I go straight to church.

14 THE COURT: It is the judgment of the Court
15 that the defendant Dohnert be remanded to the custody
16 of the Attorney General for a period not to exceed two
17 years.

18 All right, Marshal.

19 Are there any open counts?

20 MR. KORN: Yes, there are.

21 THE COURT: If there are open counts, motion is
22 made to dismiss?

23 MR. HANRAHAN: Yes.

24 THE COURT: In which there is no objection raised?

25 MR. KORN: No objection.

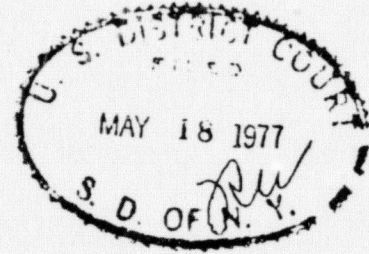
THE COURT: It is granted.

oOo

A-8A

ards

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,

-vs-

JOSEPH DOHNERT, a/k/a "Juan",

Defendant

76 Cr. 1098

KTD

B E F O R E:

HON. KEVIN THOMAS DUFFY,
District Judge

New York, New York
April 25, 1977--10:20 a.m.

A P P E A R A N C E S:

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York
BY: HENRY KORN, ESQ.,
Assistant United States Attorney

JAMES HANRAHAN, ESQ.,
Attorney for the Defendant

PRESENT:
JOHN CURLEY, ESQ.

A-9

1 ards

2

2 THE CLERK: United States against Joseph
3 Dohnert.

4 MR. KORN: The government is ready, your
5 Honor.

6 MR. HANRAHAN: Ready.

7 I am James Hanrahan and I represent Joseph
8 Dohnert, Judge.

9 This is an application under Rule 25 to correct,
10 modify and reduce sentence here. Although the sentence
11 has not been determined as yet, based upon, I believe,
12 Section 4205, Sub-division C, relative to a study to be
13 made to predetermine whether a sentence would be imposed
14 upon this man.

15 This is, as I understand, a nonviolent crime,
16 it's a counterfeiting charge against him. He has never
17 been arrested or jailed before as I understand it.

18 Furthermore, Judge --

19 THE COURT: Are you sure about that?

20 MR. HANRAHAN: From what I can gather. I may
21 be mistaken, but that's not the first time.

22 However, I will say that, if I may point out
23 to the Court that one of the main facts upon which my
24 application hinges is the fact that this man has been
25 treated at Columbia Presbyterian for a period of over ten

1 ards

3

2 years, somewhat from ten to twelve years as an out-patient.

3 He has been in the psychiatric division of
4 said hospital and seen by Dr. Weiser and, I believe that
5 he was --

6 THE COURT: Wait a second, you have a problem.
7 Do you know what your problem is?

8 MR. HANRAHAN: Let me hear it.

9 THE COURT: You have not had a chance, I take
10 it, to look at the pre-sentence report. John Curley, who
11 represented the defendant on behalf of the Legal Aid Society,
12 wrote to Dr. Weiser and Dr. Weiser informed us or Mr. Curley,
13 who in turn informed me, that the defendant in July 1974,
14 was hospitalized and treated for several months and then
15 discharged. So it is not, first of all, ten years.

16 After he was discharged, apparently he had
17 no psychiatric problems thereafter until some time around
18 March of 1977.

19 If you check the date of this indictment, it
20 is December 3, 1976, and in 1977 he came in and said that
21 he was suffering from insomnia, depression and general
22 instability.

23 It is the basis of your motion from what I
24 understand that this man is being treated as an out-patient
25 for a long period of time by Dr. Weiser. Dr. Weiser's

A-11

ards

4

report does not show that.

What I was aiming for was trying to get this man into one of the best, and it is one of the best psychiatric-type hospitals -- what do you call them -- institutions, and to see whether we couldn't find out what was really troubling the man. That is all I was going for.

There are all kinds of problems with this sentence. Why did he bring his 15-year old son along to pick up counterfeit bills? I don't know, it bothers me.

Why do you bring a kid into a situation like that?

Now, with that kind of background, let us go. Let me hear what you have to say.

MR. HANRAHAN: What I am saying in effect is briefly this: That you have outlined what his previous treatment has been and so forth but from what I can understand from his wife, he has been -- they have been living and married since 1968 or 1967 and they have children and I understand he was being treated at that hospital or maybe mistakenly another hospital. But I know that he has been treated for a long period of time as an out-patient and he has a lot of emotional problems and that he was in this position, Judge, that confinement, incarceration, study, whatever it may be, has caused this man, I might add, he

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2 attempted suicide at one time if I am correct.

3 THE COURT: Twice.

4 MR. HANRAHAN: All right, Judge, twice.

5 The fact is that the present status of him is
6 he may be suicidal under the study or at the jail at the
7 present time.

8 We have a problem both from an emotional and
9 from not only a capacity to serve time but to be able to
10 do this because here is a man at age 44 who never committed
11 a crime in his entire life, suddenly finds himself in this
12 position, as I understand it, Judge, the first time that
13 he is up here on a crime, a major crime which I would
14 categorize it. It is a counterfeiting matter but which
15 possibly has added likewise to his emotional instability.

16 But more important the man is emotionally
17 wrought. He called me on Friday afternoon and if you heard
18 the conversation I had with him I would say that the man
19 is very, very deeply disturbed, borders on the line of a
20 psychotic individual and perhaps, and I don't say this --
21 just willy-nilly, but I do say that the man is in a fit
22 of frenzy at the present time.

23 He is taking seven pills a day as I under-
24 stand, including valium and all of that and that is one of
25 the worst types of medication to take, but the question is

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whether or not he can survive under this matter, Judge.

I would say that he is not intellectually but because of the fact that he is now in a capacity where he is full of drugs and where he is unable to reason properly, where he is unable even to reason with his attorneys and in this state of condition, Judge, that he feels that he cannot stand it, Judge.

The only thing I can say to you, frankly, is that if you placed him on probation and made a strict condition that he go for the out-patient psychiatric clinic, there may be hope for this man and, of course, he has his family to support. He has a lot of obligations that's probably prying on his mind as well, Judge.

So you have a man of 44 who you have indicated might have another record, which I don't know. But what I am concerned about --

THE COURT: It is mine. I took that into consideration.

MR. HANRAHAN: What I am concerned about, Judge, is whether or not this man can survive even a study.

The question is very often, we get to the point where a man is jailed who is of a nature that he is at the cracking and breaking point and the question is whether he can survive a prison sentence. That is often

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not taken into consideration.

THE COURT: Sure it is. It is by this Court.

MR. HANRAHAN: I understand that. I am just saying that that is a factual setup here which often is overlooked but I am not saying anything about this Court, Judge.

THE COURT: Look, you are not offending me, say whatever you want.

MR. HANRAHAN: Judge, I don't intend to offend anyone at all but I know one thing, this man is ill. And in this respect he can't take the incarceration of the study. I'll speak to you frankly.

THE COURT: All right, fine. Now, my problem is what do I do with him? He is so sick that he has gone out and committed a crime. Although Mr. Curley took the position that the probation report was wrong, at least on one occasion, his wife reported him as hostile, etc., and I will give you a direct quote.

"Unfaithful, hostile and a heavy drinker.

My question to you is, do you just turn him loose? I can't do that.

Not only do I have to judge a sentence and the impact upon the defendant, but also the impact on society. And if this man is truly disturbed, as disturbed

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as you say he is, then intensive psychiatric help seems to be the type of thing which is required.

I can do no more. I made it clear on the sentencing, I believe -- you weren't here -- but I made it clear I was not sentencing him to anything except, right now, a study and I want the complete study done. That is the only fair thing to do.

MR. HANRAHAN: Can I ask this question? Was Dr. Weiser's report presented to you? Is that what happened here?

THE COURT: Sure. Do you want to read it? Here it is (handing to counsel).

MR. HANRAHAN: Thank you.

THE COURT: Mr. Curley, you saw that, it was sent to you?

MR. CURLEY: That is correct.

THE COURT: That is what I thought.

MR. CURLEY: I advised Mr. Hanrahan of the nature of the contents of that and we discussed this case Monday at my office.

MR. HANRAHAN: I didn't quite get the import of Mr. Curley's statement but I got the feeling, Judge, very truthfully, that there was much more psychiatric condition than just this.

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But I got also the feeling that from speaking with him and from his family, and judged by the statement made by Dr. Weiser, that he has been treated as an out-patient, receiving supportive psychotherapy and medication.

THE COURT: Since when?

MR. HANRAHAN: March.

THE COURT: March of 1977. That is not a ten-year history which is portrayed in your motion papers.

I am sure that you may have had difficulty in communicating fully with the family, but I will tell you, while I agree with you that the man is disturbed, the only way that I can get the appropriate type of information that I need to pass sentence finally upon him is by this kind of study.

As I recall -- maybe I am wrong -- Mr. Curley I know you were here, I am not entirely sure whether Mr. Korn was here --

MR. KORN: Mr. Handel was.

THE COURT: That is what I thought.

Is it not true that as part of the report I requested the hospital to do it as soon as possible?

MR. KORN: I see by Mr. Handel's notes.

THE COURT: You weren't here, that is purely your hearsay. John Curley, do you recall that?

MR. CURLEY: I don't recall. I believe there was some discussion about that. We had brought to the Court's attention the fact that Mr. Hanrahan was being retained and your Honor had stated about the study being concluded as quickly as possible.

THE COURT: The only thing I can do is wait for the complete study. The other thing I could do would be to have him brought over to the Supreme Court and sent to Matawan. Believe it or not, that is not much of a Hobson's Choice.

MR. HANRAHAN: I understand why and I have visited several people up there and I know what it is.

THE COURT: Unfortunately, I don't want him to go back again.

MR. HANRAHAN: I didn't go as a patient, I made a visit.

The only thing I can say is that certainly Mr. Dohnert requires continued psychiatric treatment and whether Ellenville or the drugs that take people out of the depression is not -- I am saying I think out-patient treatment because I am a little familiar with that, Ellenville has worked wonders with out-patient people, it has got them out of their depression and restored them inside of two weeks. I can make that statement to you.

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2 THE COURT: But that does not actually attack
3 the underlying problem. Sure it takes care of the nerve
4 endings but does not take care of the brainwaves which
5 start the nerve endings to tingle.

6 I am sorry, I will not modify the sentence
7 as imposed right now.

8 MR. HANRAHAN: All right, Judge.

9 THE COURT: I tell you what, though, you gave
10 it a good shot. Do you want to read the entire thing? You
11 can.

12 There was one thing in there which Mr. Curley
13 told me I was wrong about, that is the hostility between
14 the man and wife. I believe him.

15 But I think you will find he had been arrested,
16 I think, for drunk driving and fined \$100 and lost his
17 license. It is not the first time around that he has been
18 in a courtroom. It is my recollection that you should make
19 sure of all the facts before you go ahead.

20 On the facts I have before me, the sentence
21 will stand. The motion for an adjustment of sentence is
22 denied.

23 MR. HANRAHAN: I will read this over.

24 THE COURT: Absolutely, sit right down there
25 and read it over.

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MR. HANRAHAN: I wonder whether this man can be reviewed by his own doctor, Dr. Weiser, and then determined as part of the study as to whether or not he is fit to resume his position in society?

THE COURT: No. I want a totally independent study done. He's going off to Springfield.

Mr. Korn, notify the marshals to have him moved out as soon as possible.

MR. HANRAHAN: All right.

* * * *

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Elaine Russell
Official Court Reporter
U. S. District Court

A. 26

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2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x
5 UNITED STATES OF AMERICA, :

6 Plaintiff, :

7 - vs. - : 76 Cr. 1098

8 JOSEPH DONHERT :
9 a/k/a "Juan" :

10 Defendant. -----x

11
12 September 14, 1977
13 10:30 a.m.

14 B e f o r e:

15 HONORABLE KEVIN THOMAS DUFFY,

16 District Judge

17 Appearances:

18 For the Government: ROBERT B. FISKE, JR., ESQ.,
19 United States Attorney for the
Southern District of New York

20 BY: HENRY KORN, ESQ.,
21 Assistant United States Attorney

22 For the Defendant: JAMES HANRAHAN, ESQ.

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2 (In the robing room.)

3 THE COURT: Mr. Hanrahan, this is your
4 motion.

5 MR. HANRAHAN: Your Honor, at the outset,
6 may I say this: We brought on an order to show cause
7 to vacate the sentence and to vacate the entire proceedings
8 against this man as void and nugatory and we say the
9 superseding indictment replaced the first indictment
10 and therefore although the prosecutor has said that
11 there is another charge against the defendant, a conspiracy
12 charge, this would be putting the defendant, in effect,
13 in what we would term double jeopardy and the question
14 is whether he has been put in jeopardy for the same
15 offense.

16 They say the conspiracy charge was not
17 included in the count but you cannot enlarge an indict-
18 ment once handed down by a superseding, Judge, and this
19 is one of our bases for our contention that if the first
20 indictment is not good and since it has been superseded
21 by a second indictment, because of that I feel, your
22 Honor, that we should then be in a position to have this
23 man arraigned and to have a trial in this matter, but
24 then we ask the second question: Is the defendant
25 entitled to due process both in the first and second

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2 indictments, meaning does due process attach and come to
3 this defendant and if it does and the prosecutor has
4 now had a second indictment, that means there may be
5 failure or admissions in the first indictment, or defi-
6 ciencies, which occurred which then caused the first
7 indictment to be void and, therefore, the basis upon
8 which this man pleaded guilty to a void indictment
9 would have no legal effect.

10 The next question, has the prosecutor
11 the power to dissolve the second indictment if the second
12 indictment was handed down in all conformity with the
13 law and all conformity with due process. That is another
14 situation that arises.

15 The next situation that arises is this:
16 What posture is this case in in view of the fact that
17 the defendant has entered a plea of guilty to the ori-
18 ginal indictment which we contend is void and anything
19 ensuing thereon is void.

20 We contend that because we say no instruc-
21 tions were given to the grand jury on the first indict-
22 ment or even the second indictment. In New York State
23 they have Section 190, Subdivision 6, where legal instruc-
24 tions must be given by a prosecutor to an indictment.

25 I am not going to bore your Honor, but

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I don't know if you examined the minutes of the first or second indictments or what happened, but all I can say is that it appears to me they may have used statements made by this defendant to a probation officer to be the basis of a second indictment.

If so, that would render the second indictment, as well as the first indictment, which we say is deficient, both nugatory and we are then in that posture, where either indictment is valid.

I move, your Honor, that in view of the fact that this man has now come before the Court and he had entered a plea of guilty to the first count under the first indictment, to wit, possession of 20, I believe, \$100 counterfeit bills, that that is illegal, that entry of a plea, and that Frank Chierco who was the co-defendant, I believe, in the first indictment and now they branched it out with a conspiracy charge between him and Frank Chierco and that cannot be so in the first indictment nor can the first indictment be sustained.

This goes back to the old case of ex parte Baine, at 121 U.S., in which they say you cannot amend an indictment and although this is a superseding indictment, you cannot cross out the fact that there was one indictment and then come in with a superseding

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2 and now say that the first indictment is good and the
3 second doesn't replace the first.

4 I believe that was the import and intent
5 and therefore I submit to your Honor a little memorandum
6 of law which I am hopeful that might prove of benefit,
7 but this is a rather strange proceeding to me, to have
8 a U.S. Attorney write to me and say he is going to
9 quash the second indictment as to any client. I
10 don't understand that, if he has to quash it, he has to
11 squash the whole indictment, not part of it and I don't
12 know if that can be done. That mystifies me beyond
13 belief.

14 That's all I have.

15 MR. KORN: Your Honor, the Government
16 believes that the defendant's motion to vacate his plea
17 and sentence on Count 1 of the original indictment to
18 which he pled guilty in February of 1977 should be
19 denied.

20 As we indicated in our letter to the Court
21 last week, we believe the defendant pled guilty to
22 Count 1 of the original indictment which charged him
23 with the sale of \$2,000 worth of counterfeit \$100
24 Federal Reserve Notes on February 25, 1977, we believe
25 that was sentenced by this Court on August 23rd, 1977 to

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the two-year imprisonment with respect to that count, and we believe that the superseding indictment can be nolle, by the Government and with the Court's permission with respect to the entire superseding indictment to the defendant Dohnert and that therefore his sentence and plea with respect to the original indictment, with respect to the original Count 1 of that indictment can stick and the Court can then dismiss the remaining counts, Counts 2 and 3 --

THE COURT: I already did that.

MR. KORN: Which was the understanding and intent of the Court, I believe, as reflected in the transcript of August 23, 1977.

The Government believes that if there is any problem at this point it is purely an error that can be rectified by the Court's reissuing its judgment and commitment, judgment and finding, and that is to indicate that it was sentencing Mr. Dohnert on Count 1 of the original indictment and dismiss the remaining counts of the original indictments and the Government will then nolle the superseding indictment entirely as to Mr. Dohnert.

MR. HANRAHAN: Your Honor, I don't think it is a question of error, it is a question of due

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2 process. Can these matters be rectified? Ex parte
3 Baine says you can never rectify situations with respect
4 to indictments. You are going into the whole process
5 of indictments and opening up a new area where you are
6 now saying, in effect, that the prosecutor has a right
7 to sever a conspiracy and say, "We are not going -- we
8 are going to nolle prosequi as far as Dohnert is concerned
9 on the conspiracy count," and I don't understand how
10 that could possibly be done under law.

11 The grand jury has handed down a super-
12 seding indictment and they have said, "We have heard
13 evidence that there was a conspiracy here," and now the
14 prosecutor comes in and says, "Regardless of what the
15 grand jury says, they don't mean anything because we
16 are going to split this and we are going to nolle
17 prosequi it."

18 Then the grand jury function has been
19 seriously impaired, it is going into encroaching upon
20 the grand jury's function and I believe there is no
21 power than can be done with respect to splitting an
22 indictment.

23 The prosecutor says it is pro forma. It
24 is not pro forma, but the magistracy of the law lies in
25 the grand jury and you cannot divest the grand jury of its

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power with respect to saying, "We are going to amend this and now strike out what is against Dohnert and say we are going to nolle pros it and now we are going on trial against Chierco," if they do. That is something they have no power, I believe, under the law to say.

Furthermore, was this indictment handed down by the same grand jury, was it a different grand jury, was the superseding indictment handed down by a different grand jury? That is another situation. What are the dates these indictments were handed down and who were the foremen of these grand juries, and the like, Judge?

I believe that the grand jury area is not only secret but sacrosanct in that respect. I do say I believe that counsel is entitled to legal instructions if they are given, or should have been given to the grand jury with respect to each and every count under the first indictment and then under the second indictment.

I am arguing, your Honor, that both indictments, in effect -- first of all, the first indictment is void and I am arguing that the prosecutor cannot separate the conspiracy charge and I am saying that he has placed this man in jeopardy by his superseding

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indictment and by his statement that he is going to do

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that and it is not a question of whether he is in jeopardy

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but whether he has been placed in jeopardy.

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Judge, it is my feeling that this matter

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is a complex matter, it is an invasion of the grand

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jury and I don't think that the prosecutor has that

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power and I say that most respectfully.

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MR. KORN: Your Honor, I merely want

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to insure that the record reflects a number of things

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in response to what Mr. Hanrahan said. First of all,

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two different grand juries handed up the original indict-

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ment, December of 1976, and the superseding indictment,

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which is June of 1977. That fact is quite clear.

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Second of all, the Government believes

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it has the power to ask the Court to file a nolle pros

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with respect to the superseding indictment. For whatever

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reason the Government feels an indictment should be dis-

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missed, whether it asks the Court to file a nolle prosequi,

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we feel we have the power to file such a document which

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will thereby dismiss the superseding indictment.

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As we stated in our letter of September 7,

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1976, the original indictment dated September of 1976 and

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the superseding indictment of June of '77 are identical

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in all respects except that the Government added the

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1 conspiracy count, Count 1, of the superseding indictment,
2 but as we stated in that letter and earlier on in this
3 proceeding, it was always the understanding of the
4 defendant, his counsel and the Court and the Government
5 that the defendant was pleading guilty to Count 1 of the
6 original indictment, which appears as Count 2 of the
7 superseding indictment, and he was sentenced on Count 1
8 of the original indictment.
9

10 MR. HANRAHAN: I am asking you, Mr.
11 Prosecutor, and I state this under the Ninth Amendment
12 to the United States Constitution, unenumerated powers
13 reserved to the citizens of this country, in this respect,
14 that no one can deny that the Ninth Amendment gives
15 certain rights to people outside of the powers that
16 Congress has and this is outside of what Congress dele-
17 gates as crimes, and so forth, and outside of the
18 legislative intent and only the judiciary can interpret
19 and only the Court and the Judge has the power to deter-
20 mine what is outside of the Constitution.

21 I say, your Honor, that there is a
22 mixed question here both under his civil rights as to
23 whether or not he is being deprived of his civil rights
24 with respect to Title 42 Section 183, as to whether or
25 not he is getting equal protection under the laws under

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2 the grand jury and also I am saying that the function
3 of the prosecutor has exceeded his powers in the sense
4 that he is now doing things that the legislature never
5 intended him to do but, more important, that the legis-
6 lative powers never gave him the right to separate a
7 conspiracy and nolle pros it.

8 I would like to know what occasions he
9 cites that give him this power to invade a grand jury
10 and to do this, Judge, whether the Congress of the United
11 States did not give him that power and it is assumed,
12 and we are fighting against what I believe is custom
13 and what is custom may be handed down but it may not be
14 the law, Judge, and that is the very thing I believe
15 under the Ninth Amendment every man has a right to
16 challenge in this country, the invasion of his inherent
17 human rights, to stand up in this nation and challenge
18 the right of any prosecutor or any legislative power
19 to do an act, or a prosecutor to do an act beyond his
20 scope. That is what I am saying, in effect, Judge,
21 and I say this most respectfully to this Court and I
22 am not here to quibble with the prosecutor. He has
23 probably done this on many occasions but I am here to
24 challenge in that respect on behalf of my client as an
25 American lawyer to do that to the best of my ability.

2 THE COURT: Anything else?

3 MR. KORN: No, your Honor.

4 THE COURT: All right, the motion is
5 denied. The statement contained in the moving papers,
6 that I refused to permit Mr. Hanrahan to see the report,
7 is an out and out lie.

8 MR. HANRAHAN: I didn't say that, Judge,
9 I didn't say you refused.

10 THE COURT: It has been the custom in
11 this Court, at least with me, to let any defense attorney
12 see anything that I see in connection with a sentence.

13 MR. HANRAHAN: If I said that statement,
14 you would be quite correct, but I don't believe I
15 either said it or meant it. I didn't ask you, Judge,
16 that was the question. That may be so.

17 THE COURT: That might reflect upon
18 yourself, but I don't want it reflecting upon this Court.

19 MR. HANRAHAN: Let me say this: The
20 attack upon me is not the intention here -- my argument
21 is not with the Court, my argument --

22 THE COURT: I understand what your argu-
23 ment is, but I am still saying the motion is denied and
24 we might as well clean up the record.

25 MR. HANRAHAN: But you are saying something

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not contained in the papers, Judge.

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THE COURT: Give me a copy of them.

4

(Pause.)

5

THE COURT: "Further, the contents of the study were not revealed to counsel at the time of the study and counsel cites this is additional ground for setting aside the sentence as illegal."

9

That is signed by Mr. Hanrahan.

10

MR. HANRAHAN: They were not shown to counsel --

12

THE COURT: You did not ask to see them, did you?

14

MR. HANRAHAN: Of course I didn't ask to see them, but I am asking now to see them and I am asking you to retract your statement.

17

THE COURT: I will not retract my statement.

18

MR. HANRAHAN: That is a very serious offense

20

THE COURT: I know exactly what I said, Mr. Hanrahan, and I thought about it before I said it.

22

MR. HANRAHAN: I agree you may have thought about it, but that is a very bad thing to say about counsel because if I didn't ask for it -- I didn't say you refused to show it to me. That came to me as

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really something -- you know, that is an unfair statement
to make about counsel. You did not refuse me.

THE COURT: You didn't ask.

MR. HANRAHAN: But that is different.

THE COURT: It reflects upon your abilities,
not mine.

MR. HANRAHAN: All right, let me see the
papers then.

THE COURT: You can see the papers any
time you want to.

MR. HANRAHAN: Judge, I want to ask for
bail for this man.

THE COURT: Absolutely not.

MR. HANRAHAN: I take an exception, Judge.

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